LEADMONT DEVELOPMENT SDN BHD v. INFRA SEGI SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
WONG CHEE LIN JC
[ORIGINATING SUMMONS NO: WA-24NCC-237-05-2018 & WA-24NCC-255-05-2018]
4 OCTOBER 2018

COMPANY LAW: *Business and schemes – Judicial management order – Whether there was full disclosure of material facts during judicial management – Whether judicial management order obtained in mala fides – Whether judicial management order null – Whether ought to be set aside – Companies Act 2016, s. 421(2)*

CIVIL PROCEDURE: *Setting aside – Order – Judicial management order – Allegation that company failed to make full disclosure of material facts during judicial management – Whether judicial management order obtained mala fides – Whether judicial management order null – Whether breach of natural justice and in contravention with statutory provisions – Whether ought to be set aside*

The applicant, the developer of a stalled project ('the project'), was unable to pay its debts. Amongst its creditors was the respondent, the main creditor of the project which the applicant was carrying out on a piece of land owned by its subsidiary, Sierra Delima Sdn Bhd ('Sierra Delima'). The applicant's rehabilitation largely depended on the completion of the project and this, in turn, depended on its ability to secure a foreign currency loan in the amount of USD40 million from SSG Capital Management (Hong Kong) Limited ('SSG') and proposed advances from Augment Prosperity Sdn Bhd ('Augment Prosperity') to Sierra Delima estimated in the amount of RM30 million. Augment Prosperity shared common shareholders with the applicant. The shareholders' loan was from a proposed disposition of a piece of property belonging to Augment Prosperity. At the hearing of a judicial management order ('JMO'), the applicant informed the court that the Sierra Delima entered into advance negotiations with SSG and exhibited indicative discussion paper. The Central Bank of Malaysia had already approved this foreign currency loan up to an amount of USD36 million. The remaining loan amount of USD4 million did not require the Central Bank's approval. In the present application, the applicant's creditor, Infra Segi Sdn Bhd, applied to set aside the JMO granted on the grounds that the applicant failed to make due disclosure, and further suppressed, material facts and had acted *mala fides*. After the JMO was served on it, the respondent intervened in the proceedings and sought to set aside the JMO. The respondent also intervened and sought to set aside the JMO obtained by Sierra Dilema in another proceeding. The respondent argued that there was a breach of natural justice that would render the JMO a nullity, entitling the respondent to set it aside.

Held (allowing respondent's application and setting aside judicial management order):

(1) There was no dispute that the respondent, being a substantial creditor of the applicant, had an interest in the proceedings. Furthermore, the respondent had no knowledge of the application for the JMO. However, the applicant had complied with all the statutory requirements as to the advertisement of the application. It did not have to serve the application on any particular creditor as there was no debenture holder who was entitled to appoint a receiver and manager. Therefore, there was no breach of natural justice that would render the JMO a nullity, entitling the respondent to set it aside. However, even though the respondent could not show a breach of the rules of natural justice and contravention of a statutory provision, the court does have the inherent jurisdiction to set aside an *ex parte* order if the order was obtained without full and frank disclosure or if it was obtained *mala fides*. (paras 74, 76 & 79)

(2) The court should not set aside the JMO on the ground of non-disclosure of material facts or *mala fides*. Although more information should have been given during the application for the JMO, the applicant had disclosed sufficient facts to satisfy the threshold for the granting of a JMO and the facts which were not discussed would not have led to the court refusing a JMO. However, the respondent has applied to set aside the JMO. Section 421(2) of the Companies Act 2016 provides that the proposal of the judicial manager ('the JM') shall be approved by 75% of the total value of creditors whose claims have been accepted by the JM, present and voting at the meeting held for that purpose. (paras 100-102)

(3) The JM filed an affidavit for Sierra Delima stating that, as at the cut-off date of 26 June 2018, the respondent's admitted claim amounted to 38.7% of the total value of creditors, which amounted to RM342,120,627. The respondent was owed a sum of RM132,329,905. Taking into account the claims of the nominated sub-contractors who have stated their opposition to the JMO, the total value of the respondent and the six nominated sub-contractors amounted to 46.9% of the total value of creditors. Although there was no affidavit affirmed for Leadmont, the value of the respondent's debt in Leadmont would amount to approximately 26% of the total indebtedness. This clearly and obviously meant that there was no way the scheme to be proposed by the JM could be approved by the requisite majority of creditors. The proposal was an exercise in futility, as more than 25% of the total value of creditors would vote against any scheme, and the applicant would not achieve the requisite majority of creditors. (paras 103 & 104)

(4) The respondent's application was allowed and the JMO was set aside with costs. The parties agreed that the decision in this case would bind the *Sierra Delima* case where the respondent similarly applied to set aside the JMO obtained by Sierra Delima. Accordingly the respondent's application in that case was also allowed with costs. (paras 105 & 106)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Cornhill Insurance Plc v. Cornhill Financial Services Ltd And Others [1993] BCLC 914 ***(refd)***
Lai Cheng Ooi v. Lim San Peen & Anor And Other Appeals [2017] 1 LNS 1390 CA ***(refd)***
Lai Cheng Ooi v. Lim San Peen & Anor And Other Appeals [2018] 7 CLJ 145 FC ***(refd)***
Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA ***(refd)***
PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals [2010] 1 CLJ 940 CA ***(refd)***
Re Dianoor Jewels Ltd [2001] 1 BCLC 450 ***(refd)***
Re Harris Simons Construction Ltd [1989] BCLC 202 ***(refd)***
Re MTI Trading Systems Ltd (In Administration) And Others [1998] 2 BCLC 246 ***(refd)***
Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***
The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd And Another Appeal [2012] SGCA 9 ***(refd)***

Legislation referred to:
Companies Act 2016, ss. 176, 366, 404, 405(1)(b)(iii), (5)(a), 407(3), 408(1)(b)(ii), 409, 421(2), (5), 424(1), (2)(a), 425(1)(a), (3)(d), 466(1)
Companies Commission of Malaysia Act 2001, ss. 17, 19
Companies (Corporate Rescue Mechanism) Rules 2018, r. 2
Rules of Court 2012, O. 32 r. 6, O. 42 r. 13, O. 92 r. 4

Insolvency Act 1986 [UK], ss. 18, 27
Insolvency Rules 1986 [UK], r. 7.47
Companies Act (Cap 50) [Sing], s. 227B

Other source(s) referred to:
TC Choong & VK Rajah, *Judicial Management in Singapore*, pp 97-98
Kenneth Foo Poh Khean & Lee Shih, *Companies Act 2016: The New Dynamics of Company Law in Malaysia*, p 454

For the applicants - Teo Cheng Wee & Yong Juk Chee; M/s Khaw & Partners
For the respondent - Siew Yew Ming & Chan Mun Fei; M/s Raja Eleena Siew Ang & Assocs
For the judicial manager - Desmond K L Ng & Chong Kah Yee; M/s Shui Tai

Reported by Najib Tamby

JUDGMENT

Wong Chee Lin JC:

[1] This is an application by Infra Segi Sdn Bhd, a secured creditor of the applicant Leadmont Development Sdn Bhd ("Leadmont" or "the applicant"), to set aside the judicial management order that this court granted on 14 June 2018 ("JMO") on the grounds that the applicant has failed to make due disclosure of material facts and had suppressed material facts and

had acted *mala fides*. I have allowed the application, not on the grounds relied upon by the respondent but on a different ground. These are the full reasons for my decision.

Salient Background Facts

[2] The applicant is the developer of a project known as Selayang StarCity project which project has stalled as the main contractor which is the respondent and the nominated sub-contractors have not been paid and have consequently terminated their contracts.

[3] It is not in dispute that the applicant is unable to pay its debts. Amongst its creditors is the respondent being the main contractor of the project that the applicant was carrying out on land owned by its subsidiary Sierra Delima Sdn Bhd ("Sierra Delima").

[4] Sierra Delima owns the piece of land held under Pajakan Negeri 97183, Lot No. 168. Bandar Selayang, District of Gombak, State of Selangor Darul Ehsan ("said land").

[5] The Selayang StarCity project sits on the said land.

[6] The Selayang StarCity Project consists of one block of hotel (Block A-315 units) and three blocks of designer suites (Block B-320 units; Block C - 660 units and Block D-822 units) which sit on a shopping mall podium with a 550,000 sqf lettable retail space.

[7] The total estimated gross development value of the Selayang StarCity project is RM1.4 billion whilst the total estimated gross development cost is RM1.2 billion.

[8] Leadmont's rehabilitation will largely depend on the completion of the Selayang StarCity project and this in turn depends on its ability to secure a foreign currency loan amounting to USD 40 million from SSG Capital Management (Hong Kong) Limited ("SSG") and proposed advances from Augment Prosperity Sdn Bhd (which has common shareholders as Leadmont) to Sierra Delima estimated to amount to RM30 million. This shareholders' loan is from a proposed disposition of a piece of property belonging to Augment Prosperity Sdn Bhd.

[9] At the hearing for the JMO application, the applicant informed the court that Sierra Delima has entered into advance negotiations with SSG and exhibited the indicative discussion paper.

[10] The Central Bank of Malaysia has already approved this foreign currency loan up to an amount of USD 36 million. The remaining loan amount of USD 4 million does not require the Central Bank's approval.

[11] It is proposed that the funds will be utilised to complete the Selayang StarCity project.

[12] Leadmont represented that there is an estimated cash inflow of RM801.8 million from Sierra Delima to Leadmont from the Selayang StarCity project. The expected cash inflow will be utilised to pay the debts due to Leadmont for the respective construction works and management fees and after payment of the debts to Leadmont, the remaining surplus will be used to fund the construction works for block A, B & D of the Selayang StarCity project. Initially, the intention is only to complete the mall and Block C, not Blocks A, B and D.

[13] After the JMO was served on it, the respondent successfully intervened in the proceedings and sought to set aside the JMO order on the grounds that there has been material non disclosure of facts and that the applicant had acted *mala fides*. In separate proceedings, Sierra Delima had also obtained a JMO and the respondent has similarly intervened in the said proceedings to set aside the JMO obtained by Sierra Delima. The two applications are heard together.

Findings Of The Court

[14] The Corporate Law Reform Committee ("CLRC") was established by the Companies Commission of Malaysia ("CCM") pursuant to ss. 17 and 19 of the Companies Commission of Malaysia Act 2001 on 17 March 2003.

[15] The CLRC was established to undertake a fundamental review of the current legislative policies on corporate law in order to propose amendments that are necessary for corporate and business activities to function in a cost effective, consistent, transparent and competitive business environment in line with international standards of good corporate governance.

[16] As part of the consultative process to obtain feedback from the relevant stakeholders, the CLRC published 12 consultative documents for public consultation.

[17] In one of these consultative documents issued in August 2007, the CLRC recommended the introduction of a statutory scheme known as judicial management to facilitate the rehabilitation process of a financially distressed company.

[18] The CLRC recommends that:

(a) in general, judicial management allows the aggrieved party to apply to court to place the management of the company in the hands of a qualified independent person with the necessary skill and experience known as a judicial manager;

(b) the judicial manager, once appointed by the court, is an officer of the court whom will prepare a workable restructuring plan which must be acceptable to the majority of the creditors; and

(c) once approved by the creditors and sanctioned by the court, the restructuring plan prepared by the judicial manager will be implemented.

[19] In its final report to the CCM on 20 October 2008, the CLRC recommended that the court should be empowered to make a judicial management order if certain conditions are satisfied.

[20] Large parts of these recommendations were subsequently incorporated into the Companies Act 2016 ("CA 2016").

[21] It is clear from the Hansard, that the judicial management was introduced to rehabilitate companies that are under financial distress and to reduce the number of cases where companies are wound up.

> Datuk Liang Teck Meng (Simpang Renggam):
>
> minta Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan menyatakan berapakah jumlah kes syarikat yang digulungkan sepanjang tempoh 2010 hingga 2014 dan apakah peranan kerajaan dalam menangani kes syarikat yang digulungkan?
>
> Timbalan Menteri Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan (Dato' Paduka Ahmad Bashah bin Md Hanipah): ....
>
> Jumlah syarikat yang digulungkan sepanjang tempoh 2010 hingga bulan Ogos 2014 adalah sebanyak 9,010. Dari jumlah tersebut sebanyak 3,396 syarikat telah digulungkan secara sukarela manakala sebanyak 5,614 syarikat telah digulungkan melalui perintah mahkamah. Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan prihatin berhubung keperluan memperkenalkan satu mekanisme untuk menyelamatkan syarikat-syarikat yang mengalami masalah kewangan. Namun masih boleh dipulihkan untuk beroperasi secara sedia kala.
>
> Dalam hal ini, Suruhanjaya Syarikat Malaysia yang merupakan agensi kementerian ini telah mengambil inisiatif untuk memperkenalkan beberapa mekanisme penyelamat korporat melalui pembaharuan yang sedang dilakukan kepada Akta Syarikat 1965. Mekanisme yang dicadangkan ini akan menjadi satu alternative kepada penggulungan atau pembubaran syarikat. Antaranya ialah pengurusan kehakiman ...

[22] Subdivision 2 of division 8, part III of the CA 2016 came into operation on 1 March 2018 *vide* the publication of the *Government Gazette*.

[23] The operation of division 8 of part III introduced corporate rescue mechanism into our law, one of which is judicial management.

[24] Section 404 of the CA 2016 allows two categories of applicants to apply for an order that a company should be placed under a judicial management and for an appointment of a judicial manager.

[25] The two categories of applicants are:

(a) the company itself; or

(b) the company's creditor.

[26] An application for JMO may only be made if the company or its creditors consider that: A

(a) the company is unable to pay its debts; and

(b) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up. B

[27] The court's power to make a JMO and appoint a judicial manager is set out in s. 405 of the CA 2016.

[28] Section 405 of the CA 2016 is in *pari materia* to s. 227B of the Singapore Companies Act (Act 42 of 1967) and similar to s. 8 of the Insolvency Act 1986 (UK). C

[29] Section 405(1) of the CA 2016 *inter alia* provides that where a company or its directors, under a resolution of its members or board of directors, makes an application under s. 404, the court may make a judicial management order in relation to the company if: D

(a) the court is satisfied that the company is or will be unable to pay its debts; and

(b) the court considers that the making of the order would be likely to achieve one of more of the following purpose: E

(i) the survival of the company, or the whole or part of its undertaking as a going concern;

(ii) the approval under s. 366 of a compromise or arrangement between the company and any such persons as are mentioned in that section; F

(iii) more advantageous realisation of the company's assets would be effected than on a winding up.

[30] The first condition which is set out in s. 405(1)(a) is that the court must be satisfied that the company is or will be unable to pay its debts. G

[31] The word 'satisfied' indicates that there must be a higher threshold of persuasion.

[32] This is supported by the observation of Hoffman J (as His Lordship then was) in relation to s. 8 of the Insolvency Act 1986 (UK) in *Re Harris Simons Construction Ltd* [1989] BCLC 202 at p. 204 which is reproduced below: H

> Second, the section requires the court to be 'satisfied' of the company's actual or likely insolvency but only to 'consider' that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former. I

[33] The definition of 'inability to pay debts' is found in s. 466 of the CA 2016.

[34] Pursuant to s. 466(1) of the CA 2016, a company shall *inter alia* be deemed to be unable to pay its debts if:

(a) the company is indebted to a sum exceeding the amount prescribed by the Minister (which is set at RM10,000) and a creditor has served a notice of demand requiring the company to pay the sum, and the company has for 21 days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

[35] If the first condition is satisfied, the applicant will then need to persuade the court that it meets any one or more of the criteria in s. 405(1)(b) of the CA 2016.

[36] Under s. 405(1)(b) of the CA 2016, the court merely needs to "consider" that there is a "real prospect" that one of the outcomes set out in the subsection is achievable.

[37] What is a "going concern"?

[38] The words "going concern" is not defined in the CA 2016.

[39] As such, in ascertaining the definition of the phrase "going concern" the court may consider the following sources:

(i) Words & Phrases (vol. 2) (2nd edn); and

(ii) ISA 570.

[40] The definitions in these two sources are provided in the table below.

No.	Source	Definition of Going Concern
1.	Words & Phrases (Vol. 2) (2nd ed.)	The shop is being kept open, instead of being closed up
2.	ISA 570 (paragraph 2)	Under the going concern basis of accounting, the financial statements are prepared on the assumption that the entity is a going concern and will continue its operations for the foreseeable future. Note: The MIA has adopted the ISA 570 with regard to the issue of going concern

[41] In both sources, the definition of the phrase "going concern" is identical.

[42] The phrase "going concern" is interchangeable with the phrase "will continue its operations for the foreseeable future".

[43] In short, to qualify under this limb, the court will need to consider whether the making of the JMO will allow the applicant to continue its operations for the foreseeable future.

[44] If the making of the order would have a more advantageous realisation of the company's assets as opposed to a winding up, the condition in sub-s. 405(1)(b)(iii) of the CA 2016 would have been met.

[45] Even if the court is not satisfied that the making of the judicial management order would be likely to achieve one or more of the purposes set out in s. 405(1)(b) of the CA 2016, s. 405(5)(a) of the CA 2016 has the effect of vesting in the court an overriding power to make a JMO if it considers the public interest so requires.

[46] What constitutes "public interest" is not defined in the CA 2016 and so must be determined on a case to case basis.

[47] From a reading of subdivision 2 of division 8, Part III of the CA 2016 on judicial management, the special right to oppose an application for JMO is only conferred on one specific type of secured creditor.

[48] Section 409 of the CA 2016 provides that the court shall, subject to sub-s. 405(5) of the CA 2016, dismiss an application for JMO if it is satisfied that:

(i) a receiver or a receiver and manager of the whole, or substantially the whole, of a company's property under the terms of any debentures of the company has been or will be appointed; and

(ii) the making of the judicial management order is opposed by that secured creditor who has appointed or is entitled to appoint such receiver or receiver and manager of the company's property ("debenture holder").

[49] In '*Companies Act 2016: The New Dynamics of Company Law in Malaysia*' by Kenneth Foo Poh Khean and Lee Shih at p. 454, the learned authors say:

> Under the CA 2016, both conditions to veto the application must be met through the appointment of the above receiver or receiver and manager, and with the secured creditor opposing the application.
>
> Therefore, only a secured creditor who is entitled to appoint a receiver or receiver and manager over the whole, or substantially the whole, of the company's property would be able to exercise this veto. A secured creditor may have obtained substantial fixed charges over the company's property but without a debenture to allow for the appointment of a receiver or receiver and manager. Such a secured creditor would not be able to exercise any veto over the judicial management application.

[50] This 'special right' conferred on the debenture holder can also be seen from sub-s. 408(1)(b)(ii) of the CA 2016 which provides that, on the making of an application for JMO, the applicant is required to cause the notice of the application to be given to only one type of creditor ie, the same debenture holder described in sub-para. 54.2 above.

[51] What about other creditors of the company?

[52] The CA 2016 does not require the applicant to serve a notice of the application for JMO to any other creditors of the company, other than the debenture holder.

[53] From a reading of the CA 2016, it appears that 'other creditors' of the company is only entitled, during the hearing of the application for JMO, to oppose the nomination of the judicial manager and not to the making of the judicial management order - see: sub-s. 407(3) of the CA 2016.

[54] In '*Judicial Management in Singapore*' by TC Choong and VK Rajah at pp. 97-98, the learned author says:

> The holder of a floating charge, alone amongst security holders, is entitled to notice that a petition has been presented by the company or another creditor. Fixed charged holders and unsecured creditors have to depend on the vigilance of their staff in scanning the daily newspapers, *Gazettes* or the weekly court lists. By the time such a creditor gets wind of the petition, an interim judicial manager could have been appointed. Some safeguards for the creditors have been incorporated in (the Singapore Companies Act). Section 227B(3)(C) (the equipollent to our section 407(3)*) allows a majority in number and value of the creditors to oppose the nomination of a judicial manager by the company. If the Court is satisfied as to the grounds of objection, it may invite the creditors to nominate another judicial manager. This right is, however, restricted as the creditors entitled to object have to be a majority in number as well as in value of the debts owed. Furthermore, on a literal reading of (the Singapore Companies Act), when the nomination of a judicial manager is made by the company itself the (majority in number and value**) of the creditors can only be heard in opposition to the nomination of the judicial manager and not to the making of the judicial management order. In practice, however, what has happened in the Singapore Courts is that the creditors in general take the opportunity to present facts to the court which will otherwise have only the often jaundiced version of facts presented by a petitioner (eg the company) before it. Strictly speaking, the court Can Refuse to hear them on the ground that they have No *Locus Standi*.

[55] At the hearing of the application for JMO, the court will exercise its discretion to grant the JMO once the court:

(a) is satisfied that the company is or will be unable to pay its debts; and

(b) considers that the making of the JMO would be likely to achieve one or more of the purposes specified in sub-s. 405(1)(b) of the CA 2016.

[56] Once the court has granted the JMO, there are only four situations in which the JMO is capable of being discharged ("the four situations"). Other than the four situations envisaged by the CA 2016, the JMO cannot be discharged/set aside.

[57] The four situations, all of which are directly or indirectly within the control of the company's creditors, are as follows:

(a) if, in the creditor's meeting, the judicial manager's proposal (with or without modification) has not been approved by 75% of the total value of creditors whose claims have been accepted by the judicial manager and the judicial manager reports the result of the meeting to court - ss. 421(5) of the CA 2016;

(b) if the purpose of the judicial management has been successfully achieved - sub-s. 424(1) and (2)(a) of the CA 2016;

(c) if the purpose of judicial management is incapable of achievement - sub-ss. 424(1) and (2)(a) of the CA 2016; or

(d) if the company's affairs, business and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members, or if a particular act or omission by the judicial manager is or would be so prejudicial to them - see: s. 425(1)(a) and 425(3)(d) of the CA 2016.

[58] There is a glaring lack of a provision in the CA 2016 and the Companies (Corporate Rescue Mechanism) Rules 2018 ("the Rules") for the setting aside of a JMO by a creditor.

[59] It is not in dispute that the respondent does not come within any of the categories whereby it can apply to set aside the JMO.

[60] Unlike the position in Malaysia (which the applicants have earlier submitted do not, other than the four situations mentioned in para. [57] above, provide for the setting aside of a JMO), English cases have recognised the right of a disgruntled creditor to apply for the setting aside of an administration order.

[61] In the English case of *Cornhill Insurance Plc v. Cornhill Financial Services Ltd And Others* [1993] BCLC 914, counsel for the applicant company had also submitted that only the administrators (the UK equivalent of judicial managers) can apply to court to discharge an administration order by virtue of s. 18 of the Insolvency Act 1986 (similar to s. 424(1) of the Malaysian CA 2016), save in circumstances where an application has been made to court by a creditor under s. 27 of the Insolvency Act 1986 (which is similar to s. 425 of the Malaysian CA 2016). The chancery division of the High Court and, on appeal, the Court of Appeal both held that the court had jurisdiction under r. 7.47 of the Insolvency Rules 1986 to deal with applications for the review and rescission of an administration order which should not have been made.

[62] Rule 7.47 of the UK Insolvency Rules 1986, which is headed 'Appeals and Reviews of Court Orders (Winding Up)', provides that:

> Every court having jurisdiction under the (Insolvency Act 1986) to wind up companies may review, rescind or vary any order made by it in the exercise of that jurisdiction.

[63] Notwithstanding the above, there is no express provision similar to that of r. 7.47 of the UK Insolvency Rules 1986 in our CA 2016, the Corporate Rescue Mechanism Rules or even the Companies (Winding-Up) Rules 1972.

[64] However, the respondent submitted that the Rules of Court 2012 are applicable as r. 2 of the Companies (Corporate Rescue Mechanism) Rules 2018 provides that where there is no specific procedure provided in these rules in respect of a voluntary arrangement or judicial management, the procedure provided in the Rules of Court 2012 shall apply. The respondent submitted that it was invoking the powers of the court under O. 42 r. 13 and/or O. 32 r. 6 of the Rules of Court 2012 as well as the inherent jurisdiction of the court preserved by O. 92 r. 4 of the Rules of Court 2012 to set aside the JMO.

[65] Order 42 r. 13 and O. 32 r. 6 of the Rules of Court 2012 provide as follows:

> 13. Setting aside or varying judgment and orders (O. 42 r. 13)
>
> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.
>
> 6. Order made *ex parte* may be set aside (O. 32 r. 6)
>
> The Court may set aside an order made *ex parte*.

[66] Order 42 r. 13 does not assist the respondent and the applicant submitted that O. 32 r. 6 only applies to an *ex parte* order made in a notice of application as O. 32 relates to applications and proceedings in chambers. The JMO was not made pursuant to a notice of application but pursuant to an originating summons.

[67] I agree with the applicant that O. 32 r. 6 of the Rules of Court 2012 is confined to the setting aside of an order made *ex parte* pursuant to an application in chambers made by a notice of application in Form 57 and is not applicable in this case. The respondent has not pointed me to any other authority which shows that O. 32 r. 6 is applicable in a situation such as the present.

[68] However, the respondent submitted that the court has inherent jurisdiction to set aside an *ex parte* order *ex debito justitiae*. The respondent relies on several cases. The first is that of the Court of Appeal in *Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15; [2000] 3 MLJ 364 where the court held as follows:

> There is, however, a category of orders of the High Court in which a person affected by the order is entitled to apply to have it set aside *ex debito justitiae* (as of right) in the exercise of the inherent jurisdiction of the court that made it without his being required to have recourse to the Rules of the High Court that deal expressly with proceedings to set aside judgments or orders for irregularity of procedure. This type of orders usually refers to judgments or orders that have failed to comply with statutory requirements.

[69] The respondent also relied on the Court Of Appeal decision in *Lai Cheng Ooi (f) v. Lim San Peen & Anor And Other Appeals* [2017] 1 LNS 1390 where it was held as follows:

> [12] In this connection, we hasten to observe that any *ex parte* order is liable to set aside by the party who had been served with such an order or by any party which is affected by such order. In setting aside such an order, the court is certainly not *functus officio* as the right of the party affected to be heard remains subsisting. It is not mandatory, as the appellant appears to suggest, to appeal or to file separate proceedings to impeach the *ex parte* order. In summary, orders obtained in breach of the rules of natural justice can be set aside in the same proceedings or in collateral proceedings *ex debito justititae* (see *Selvam Holdings (M) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 CLJ 16; [2003] 3 MLJ 201 ("*Selvam Holdings*").

[70] This decision was upheld by the Federal Court in *Lai Cheng Ooi v. Lim San Peen & Anor And Other Appeals* [2018] 7 CLJ 145.

[71] The respondent also relied on the Court of Appeal case of *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16 wherein the court held as follows:

> 2. The order relates to a judgment in default or made in the absence of a party at the trial or hearing.
>
> Then in 1982, following *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21 [1982] 2 MLJ 37, another category of cases was added to the aforesaid list. These cases refer to orders that have been obtained in breach of the rules of natural justice as such orders are nullities and they can be successfully attacked in collateral proceedings *ex debito justitiae*.
>
> Despite the above restrictions, an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or that fresh evidence, not available at the trial or hearing, had since surfaced

that may affect the order. To this we like to add another situation where a regularly obtained order can be questioned ie, where the order had been entered by consent. Under those circumstances the aggrieved party may institute fresh proceedings to attach the consent order.

In all the instances that we have cited, the normal appeal procedure is dispensed with. See also *Muniandy Thamba kaundan & Anor v. D&C Bank Bhd & Anor* [1996] 2 CLJ 586 (refd) [1996] 1 MLJ 374 and *Craig v. Kanssen* [1943] 1 All ER 108.

That was the situation until 1998 when *Badiaddin*'s case, *(supra)* came to be decided. *Badiaddin*'s case, we say, extended the scope and extent of the inherent and discretionary jurisdiction of a court with unlimited jurisdiction to set aside an earlier order in the following two circumstances.

(1) where the earlier order had contravened a substantive statutory prohibition so as render the earlier order defective on the ground of illegality or lack of jurisdiction and

(2) where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

Under the aforesaid circumstances, a court is seized with the necessary jurisdiction to entertain an application to set aside the earlier order *ex debito justitiae*. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.

[72] The respondent lastly referred to the well-known case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 wherein it was held as follows:

Held:

Per Gopal Sri Ram JCA

(1) It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. So long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is entirely open to the court upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear that in the light of the principles established, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power does not exist; and the

procedural branch of the broad and flexible doctrine of estoppels known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory, which upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

[73] The respondent pointed to and relied on a passage of the judgment that says the following:

> Since they have established their interests in the outcome of the originating summons and such interests have not been disputed the fact that they have not been cited as parties in the proceedings and that the 1993 order was obtained without their knowledge have deprived them of their right to be heard on their interests. This is a breach of the rules of natural justice and following *En Finance Berhad*'s case *supra*, the 1993 order is a nullity and can be successfully attacked in collateral proceedings *ex debito justitiae*.

[74] In this case, there is no dispute that the respondent, being a substantial creditor of the applicant, has an interest in the proceedings, and that was why the applicant did not object to the intervention of the respondent. It is also true that the respondent had no knowledge of the application for JMO as otherwise one would presume it would have objected to the granting of the JMO at that stage. However, the applicant had complied with all the statutory requirements as to advertisement of the application. It did not have to serve the application on any particular creditor as there is no debenture holder who is entitled to appoint a receiver and manager. I would therefore not agree with the respondent that there is a breach of natural justice in this case that would render the JMO a nullity and thereby entitle the respondent to set it aside.

[75] And even though it is the submission of the respondent that the applicant has not complied with the statutory provisions in obtaining the JMO, I am of the view that it cannot be said that the JMO is obtained in breach of a statutory provision for it to fall within the ambit of cases such as *Badiaddin*.

[76] However, even though the respondent cannot show a breach of the rules of natural justice and contravention of a statutory provision, I cannot accept that the court does not have the inherent jurisdiction to set aside an *ex parte* order if it was obtained without full disclosure of material facts or it was obtained *mala fides* as alleged by the respondent or on other substantial grounds. After all, in *Selvam Holdings* it was held that in exceptional cases, the court has inherent power to set aside an order where the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside.

[77] The duty to make full and frank disclosure is a duty owed to the court, because at the time, the court has only the documents produced by the applicant and no one else, to guide it in making the decision. Although technically the JMO might not be an *ex parte* order because it has to be

advertised and served on a certain category of creditors (of whom there is none in this case - in this case, the application was only advertised and obviously it was the case that the respondent did not see the advertisement) it was essentially an *ex parte* order because at the hearing the court only heard the applicant and no one else. It cannot be that if there is non-disclosure of material facts or some other defect in obtaining the order, a creditor who has interest in the proceedings cannot intervene to set aside the order which is essentially made *ex parte*.

[78] I also take note of proceedings under s. 176 of the Companies Act wherein a summary order for the convening of creditors' meetings and a restraining order would be obtained by the company without notification to all the creditors. Perhaps some friendly creditors would be given prior notice although they would not usually be made parties. Then an objecting creditor would apply to intervene and set aside the order and in many cases the courts have set aside the orders obtained by the company and the question of the court's jurisdiction to set aside those *ex parte* orders would not even be questioned. For instance, in the case of *PECD Bhd & Anor v. AmTrustee Bhd & Other Appeals* [2010] 1 CLJ 940, the High Court had set aside an *ex parte* order for leave to convene creditors' meeting and to restrain all legal proceedings obtained under s. 176 of the Companies Act 1965 *inter alia* for non disclosure of material facts and the Court of Appeal had upheld the decision of the High Court. There was no question was to the jurisdiction of the court to set aside the *ex parte* order.

[79] In my view, the inherent jurisdiction of the court is very wide and would extend to the setting aside of an *ex parte* order if the order was obtained without full and frank disclosure of material facts or was obtained *mala fides* as alleged by the respondent or was otherwise defective on substantial grounds. Of course, whether the respondent can sustain the grounds of its setting aside is another matter. I would therefore hold that the respondent has overcome the threshold issue.

[80] The respondent has raised many facts which it says the applicant ought to have informed the court. Most of those facts relate to the dealings between the applicant Leadmont and Sierra Delima and the respondent who was the main contractor for the project and some nominated sub-contractors. In essence, the facts show that the applicant or more particularly, Sierra Delima has been trying unsuccessfully to secure financing to pay the respondent and to continue the project and the respondent says that Sierra Delima has no chance of securing financing including the financing from SSG, so that the whole scheme was a sham to delay the creditors from taking legal action against the applicant and Sierra Delima.

[81] The applicant says that the reason they did not disclose the previous attempts to obtain financing was because the attempts were not successful. The applicant says that most of the matters alleged by the respondent relate to the applicant's inability to pay its debts and I am in agreement with the applicant on that point.

[82] However, the applicant did not disclose to the court that the respondent was a registered chargee in respect of the said land, Sierra Delima having agreed to grant a charge in favour of the respondent in relation to their negotiations for payment of the respondent and the nominated sub-contractors.

[83] This is relevant because it is a condition precedent to the SSG loan that SSG wants to have a mortgage over the said land. Obviously it would be impossible for Sierra Delima to give a mortgage over the said land to SSG since the respondent has a charge over the said land. The respondent says that this is a material non disclosure on the part of the applicant.

[84] The applicant says that the respondent's charge is invalid and not indefeasible and proceedings have already been taken by certain parties to invalidate the charge. Essentially what the applicant is saying is that parcels of the said land had already been sold to purchasers pursuant to sale and purchase agreements in accordance with Schedule H of the Housing Development (Licensing and Control) Act which prohibits the creation of a charge on the said land after the entering into of the sale and purchase agreements save with the consent of the purchasers. In this instance, the charge to the respondent was created without the consent of the purchasers and on this ground, that the charge was obtained in contravention of written law, the validity of the charge is sought to be challenged.

[85] Accordingly, the applicant submitted that it is not impossible to comply with the condition imposed by SSG. I am of the view that there is some basis for this submission.

[86] The respondent also submitted that the applicant failed to disclose that the term sheet between Sierra Delima and SSG had already expired prior to the hearing of the application for JMO. In the indicative discussion paper dated August 2017, it says that the term sheet expires at the end of 90 business days. However, the expiration may be extended with the mutual understanding between the lender and the borrower.

[87] The applicant says that as a matter of fact, the parties were always in negotiations and now the JM is in negotiations with SSG and has come up with a draft statement of proposals which however needs more time before it can be finalised.

[88] If the parties were still continuing negotiations with each other, then the applicant need not have informed the court that strictly speaking, the term sheet had expired because it had not.

[89] The terms negotiated with SSG also included a term that there must be subordination of any preferred payment to the respondent as main contractor and this was contrary to all the agreements that the applicant and Sierra Delima had made with the respondent wherein the applicant and Sierra Delima had represented that once the financing is obtained the respondent will be paid from the financing.

[90] The applicant's reply is that at that juncture, before the scheme is finalised, it will not be known whether or not the respondent will agree to the terms of the scheme and it would be premature to assume that that condition imposed by SSG will be impossible of fulfilment.

[91] It is trite law that in an *ex parte* application, the applicant has a duty to the court to make full and frank disclosure of all material facts. Although the applicant submits that the application for JMO is not strictly speaking an *ex parte* application, there is no denying that the applicant owed a duty to make full and frank disclosure. The following observation by Carnwath J in *Re MTI Trading Systems Ltd (In Administration) And Others* [1998] 2 BCLC 246 at pp. 2501 - 251 a is also useful:

> Third non disclosure. It is clear that those applying *ex parte* for relief owe a duty of full disclosure, and if they fail they risk having the order set aside without further investigation of the merits. That duty is equally important in urgent applications for administration orders, even though they are perhaps not technically *ex parte*, where there are no persons other than the proposed administrators entitled to be served.

[92] However, it is not in all cases of non-disclosure of facts that the *ex parte* order has to be set aside. In the same case, the court goes on to say:

> However, the consequences of non disclosure are not necessarily the same. The application is not being made on behalf of Mr Edison as an individual, but on behalf of the companies. The court is concerned with the interests of the companies and their creditors. It cannot be right that those interests should be jeopardised merely because of a failure of disclosure by the applicant, if there is otherwise merit in the case. Accordingly, while I think the court should have been given fuller information as to the nature of the legal dispute, it does not follow that the order should be set aside.

[93] The respondent also submitted that the applicant has failed to inform the court that the so-called shareholders' loan from Augment Prosperity Sdn Bhd is a no go at the outset because a company can only act in its own interest and it would not be in the interest of the company to make a loan to Sierra Delima. Augment Prosperity is a private exempt company. Its shareholders are the shareholders of Leadmont. If the shareholders of a company knowingly and unanimously resolve for the company to do something which is not for its own benefit that is in my view perfectly acceptable because the shareholders can unanimously decide what they want to do with the assets of the company.

[94] The shareholders' loan is therefore not an impossibility as long as the property along Jalan Sultan Ismail can be sold. Although the property is charged, the applicant says that after paying off the charged amount, there will still be sufficient surplus for the shareholders to make a loan of RM30 million to Sierra Delima.

[95] The respondent also says that the application for JMO was obtained in a rush after a statutory demand prior to winding up has been served. And in the application for JMO by the applicant, the applicant has not disclosed that Sierra Delima has also applied or is also applying for a JMO and *vice versa*, that Sierra Delima in its application for JMO did not disclose that the applicant has applied for a JMO. The respondent says that the applicant has acted *mala fides* in that the only intention is to prevent the creditors from winding up the companies without a proper and viable solution to pay their debts.

[96] In answer, the applicant says that that is the purpose of obtaining a JMO. That is to obtain a moratorium whereby all the creditors will be precluded from bringing legal proceedings against the company whilst the JM comes up with a scheme to rehabilitate the company.

[97] In support thereof, the applicant referred to the observation by Blackburne J in the case of *Re Dianoor Jewels Ltd* [2001] 1 BCLC 450, at Held (2):

> An administration order was a class remedy for the benefit of the company's creditors imposing a moratorium on, among other matters, the start or continuation of any legal process against the company or its property except with the administrator's consent or the court's leave and the fact that the genuine claims of a third party might be thwarted by the making of an administration order was not a reason for not making the order. Furthermore, the administration order ensured that the interests and claims of creditors were first met before the assets of the company were applied in satisfaction of a lump sum payment obligation owed by the controlling shareholder to the wife, who was not a creditor of the company ... Accordingly, although the husband's purpose in petitioning for an administration order might well have been to frustrate his wife's claim it was appropriate, given that the company was insolvent, for the company to be put into administration to protect its creditors ... .

[98] The applicant also submitted that there is no legal obligation to bring to the court's attention about Sierra Delima in its application for JMO and *vice versa*.

[99] The applicant submitted that whilst it conceded that perhaps more information should have been given in the application for JMO, there was no non-disclosure of material facts or anything which would lead to the court refusing to grant the JMO. Accordingly, the court should not set aside the JMO.

[100] I am in agreement with the submission of the applicant that the court should not set aside the JMO on the ground of non-disclosure of material fact or *mala fides*. Although more information should have been given during the application for the JMO, the applicant had disclosed sufficient facts to satisfy the threshold for the granting of a JMO and the facts which were not disclosed would not have led to the court refusing a JMO.

[101] However, there is another fact which this court has to consider. The respondent has applied to set aside the JMO. Together with the respondent, six nominated sub-contractors have also exhibited letters to confirm that they are opposed to the JMO and wish to have it set aside as well.

[102] Section 421(2) of the Companies Act 2016 provides that the proposal of the JM shall be approved by 75 percent of the total value of creditors whose claims have been accepted by the JM, present and voting at the meeting held for that purpose.

[103] The JM has filed an affidavit for Sierra Delima stating that, as at the cut off date of 26 June 2018, the respondent's admitted claim amounted to 38.7% of the total value of creditors, which amounts to RM342,120,627. The respondent is owed a sum of RM132,329,905. Taking into account the claims of the nominated sub-contractors who have stated their opposition to the JMO, the total value of the respondent and the six nominated sub-contractors amount to 46.9% of the total value of creditors. Although there is no affidavit affirmed for Leadmont, I was informed that the value of the respondent's debt in Leadmont would amount to approximately 26% of the total indebtedness. I am also informed by learned counsel for Leadmont that if the Sierra Delima scheme fails, then the Leadmont scheme would fail as well.

[104] This clearly and obviously means that there is no way the scheme to be proposed by the JM could be approved by the requisite majority of creditors. I have asked the respondent's counsel whether the respondent would give the applicant and Sierra Delima a chance to put forward the scheme before the creditors but the respondent insisted on proceeding with the application to set aside the JMO. Accordingly, much as I sympathise with the applicant's plight and its attempt to rehabilitate the company, the proposal is an exercise in futility, as more than 25% of the total value of creditors will vote against any scheme, and the applicant will not achieve the requisite majority of creditors. In the case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd And Another Appeal* [2012] SGCA 9, the court held as follows:

> ... It should be borne in mind that where there is no realistic prospect of a scheme receiving the requisite approval, the court should not act in vain in granting the application for meetings to be convened; see *Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 at [9]. This is something that the applicant's solicitors and the proposed scheme manager should take into account prior to making an application for leave to convene a scheme creditor's meeting. A failure to make a conscientious assessment of the likely prospects of scheme approval may result in adverse costs orders.

[105] As the court will not act in vain, I have allowed the respondent's application and set aside the JMO with costs of RM5,000 to be paid by the applicant subject to allocator.

[106] The parties have agreed that the decision in this case will bind the Sierra Delima case where the respondent has similarly applied to set aside the JMO obtained by Sierra Delima. Accordingly the respondent's application in that case is also allowed with costs of RM5,000 subject to allocator.